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'Should I Sue?': Navigating the New APA Landscape With Latham's Phil Perry and Andrew Prins

By Ross Todd
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The end of any U.S. Supreme Court term tends to be where the action is. But if you're a lawyer who deals with Administrative Procedure Act issues, the end of this term was a true doozy.

First the court handed down *Loper Bright Enterprises v. Raimondo*—doing away with *Chevron* deference. Then, in *Corner Post Inc. v. Board of Governors of the Federal Reserve System,* the court held that the APA's 6-year statute of limitations doesn't start ticking until a party is injured by a final agency action.

To make sense of the new APA landscape, the Litigation Daily connected with **Phil Perry** and **Andrew Prins**, partners in the Washington D.C. office of **Latham & Watkins**. They estimate they spend about 90% of their time on matters with some sort of APA element. Even before *Loper* came down last month, the Latham team put together quite the winning streak lately under the APA, scoring wins for clients United Therapeutics, SCAN Health Plan and Par Pharmaceutical in the span of about a month.

Courtesy photos

Phil Perry, left, and Andrew Prins, right, of Latham & Watkins.

Perry, who served as general counsel of the White House Office of Management and Budget under President George W. Bush and was later appointed GC of the Department of Homeland Security, likes to say the practice sits in an area where public policy meets the law. "You help translate for clients what their government can and can't do to them," Perry said.

Perry and Prins said since agency lawyers no longer have *Chevron* deference at their fingertips, they might now be more receptive to settling matters pre-litigation. "The worst thing that

happens when you are in government running a program is to have the ground slip away from you and your entire foundation for how you run the program slip away and be invalidated," Perry said. "That's more of a realistic threat now."

The following has been edited for length and clarity.

Lit Daily: So what do the *Loper* and *Corner Post* decisions mean for your practice and clients?

Phil Perry: I think it's likely they will see an even more favorable playing field. You'll probably see the federal government more likely to settle.

Corner Post doesn't seem like it will change much of what we were doing. That's because we're very often dealing with a new issue under an old regulatory structure. So there is some agency action or threatened action. It's current. It's new. That would be the foundation for the question about the limitations period for bringing those cases to invalidate that underlying regulation or to show it doesn't apply in our particular circumstances. So that's never really been a problem and we don't think it will be a problem going forward.

But the thing I'd point out is, as a regulatory lawyer, as a potential litigant, as some combination of those things, I think that you ought to have more play with the federal agencies. You ought to have more bargaining power. We certainly expect to see more of these cases settle. But often that means that you put in the work to write up a complaint, go talk to your chief counsel or general counsel's office, go talk to the Justice Department divisions, and just be honest: 'This is what we're going to do. And we're happy to work with you."

We do that almost every time. We're happy to work with the government in addressing these issues. But we're just going to be upfront and say, "This is what we think the problem is." I was an agency general counsel a couple of times. I think a general counsel looking at these things is going to say: "Okay, look, I've got a risk to the way that my program operates. And I've got to figure out how to steer clear of that risk." And that's the way you want them to think.

You don't bring silly claims. You don't file every imaginable count that you could file. You file things that matter and that will change the way the agency has to operate. Under those circumstances, the agency has an incentive to resolve your matter. So that's how we try to handle it from the regulatory phase up through litigation.

Andrew Prins: I think it is going to change the way that the authorizing statutes are drafted. What *Loper* did is overrule the idea that ambiguous terms in the statute are an implicit delegation to the agency to resolve issues. But one issue it specifically left open is Congress's ability to more expressly delegate clear policymaking authority to the agency. So I think you're going to see statutes now contain more expressed delegations along those lines. And the battle will shift from the historic *Chevron* background, which centers on whether the interpretation is reasonable, to instead focus on principles like non-delegation, which have been dormant for some time in the law but still have a little bit of teeth. The question will be if Congress is trying to give something to the agency to do, has it done so with enough guidance, has it done so in explicit enough terms. So I think it's going to be a whole new area. And it will be interesting to see how Congress reacts to it.

Perry: I think on the last point, if you look at the political crosscurrents here, there's a lot of people who say that the agencies have way too much authority. I think an initial thought some on the Right up on the Hill might have is: "Why do

we want to give so much authority to the regulatory agencies?" But I think what you'll find is that it is actually exceptionally difficult to run these programs without some degree of flexibility. So Andrew is right: There's going to be a real issue in new legislation about exactly how they define what the discretion of the agencies is. They can certainly find language to do that. I think you'll see a political push-pull on it.

Do you expect fewer of your cases to actually make it to litigation or do you expect to be dealing more directly with the agencies?

Perry: Well, I think we'll probably have a greater variety of aggressive cases. I just can't answer precisely whether it will be more or less. But I tend to think that both things are true: The agency will try to find ways out of problems that they are scared about. Agencies mostly know where they have a shaky foundation. In the 1990s, you had all sorts of rules made that were based on the notion that you could just intuit from the statutory language what you think the rules ought to be, rather than strictly construing the statute. Most agencies, when they're running their programs, know they have something back in their history that if they ever took an action might allow a company to challenge it. They're looking at something that might be pretty disruptive.

So I think both things are true: I think you'll find agencies that are worried about cases that pose those types of risks. But I also think you'll see more cases. Companies at one point thought, "I've got to weigh a longshot chance of victory against potential friction with my regulator."

First of all, we don't normally see friction with the regulator. You deal with them in a respectful way. They understand how the judicial process works. But people are nevertheless sometimes concerned about that. But if they think they have a better chance of success, I think you'll see more cases.

Well, what questions do clients have about the changes on the ground right now?

Perry: "Should I sue?"

It takes time to think these issues through. If you're a regulated entity, you've been working with 15 layers of guidance from your regulator. It doesn't matter. You can say EPA, or you can say FDA, or you can say CMS. They all speak the same common APA language. Their programs differ, but in the end, the mechanics of this are the same. So very often you'll have a set of regulations that are 20-, 30-, 40-years old. There'll be a series of guidance documents starting not long after the regulations in the statute were promulgated, which follows the passage of the statute. Then you see iterative guidance, one after another after another. Sometimes there are regulatory changes in there. Then you have generations of guidance that take you further and further from what the statute actually said. I think it's fairly common for entities in those regulatory environments to say, "Okay. Wait a minute. I can understand the first couple of guidances. But now where the heck are we? I don't really think this is the right direction."

Sometimes guidances are tantamount to a rule. Sometimes you can challenge them. It depends on the nature of them. Sometimes the new rulemaking, particularly at the change of administration, can be vulnerable. And so I think what will happen is that the agencies will have to be more careful and the clients will be more litigious.